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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 392

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

C. A. CAIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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INDEX.

	Page
Opinion below	2
Jurisdiction	2
Statute involved	3
Questions presented for review	3
Statement	4
Basis of federal jurisdiction in court of first instance	6
Argument	7
The Court of Appeals refused to follow Mississippi law as it was required to do in reversing the lower court for failure to admit the photograph	7
The admissibility of this photograph was within the discretion of the trial court	8
The Court of Appeals has erroneously taken into consideration alleged error in two instructions	13
Appendix A—Opinion rendered May 22, 1959	17
Appendix B—Judgment	24
Appendix C—On petition for rehearing	25
Appendix D—Section 7776, Mississippi Code of 1942, Annotated, Volume 6 recompiled	26

Cases Cited.

Anderson v. King, 217 Miss. 140, 63 So. (2) 792	8
A. T. & S. F. Ry. Co. v. Aynes (Okla. 1954), 271 Pac. 2d 312, 46 A. L. R. 930	11
City Service Oil Company v. Dunlap, 60 S. Ct. 201, 308 U. S. 208, 84 L. Ed. 196	7
Cunningham v. Olson Drilling Company et al., 171 Fed. 2d 392	7
Deshotel v. A. T. & S. F. Railroad Company (Cal. 1956), 272 P. 271	9

Donald, Adm., v. G. M. & O. R. R. Co., 220 Miss. 714, 71 So. 2d 776 14

Erie Railroad Company v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487..... 7

Jakeman v. Oregon Shortline Railroad Company (1929), 43 Idaho 505, 256 P. 88..... 11

Jensen v. Southern Pacific Company (California 1954), 129 C. A. 2d 67, 276 Pac. 2d 703..... 9

Lyon v. Mutual Benefit Health and Accident Association, 59 S. Ct. 297, 305 U. S. 484, 83 L. Ed. 303.... 7

Merchant's Wharf Boat Assn. v. Smith, 3 So. 249.... 8

Nemer v. The Atchison, Topeka & Santa Fe Company (1958), 156 C. A. 445, 319 Pac. 770..... 10

Spilman v. G. & S. I. R. Co., 173 Miss 725, 163 So. 445 14

University City, Mo., v. Home Fire and Marine Ins. Co. (C. C. A. 8th, 1940), 114 Fed. 2d 288..... 12

Wilkinson v. City of Jackson, 177 Miss. 414, 170 So. 901 8

Statutes Cited.

Section 7776, Mississippi Code, 1942, Annotated, Vol. 6 recompiled, p. 185 .....4, 15, 26

Title 28, Sec. 1254, U. S. C. A. 3

Textbooks Cited.

Marker, Federal Appellate Jurisdiction and Procedure, Sec. 233 7

20 Am. Jur., Evidence, Sec. 307, p. 286..... 8

20 Am. Jur., Evidence, Secs. 247 and 249..... 9

Miscellaneous Cited.

Rule 61, Federal Rules of Civil Procedure.....3, 12

Rule 51, Federal Rules of Civil Procedure.....4, 13, 15

Rule 75 (a), Federal Rules of Civil Procedure..... 5

Rule 74 (o), Federal Rules of Civil Procedure..... 6

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Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

The Illinois Central Railroad Company, Petitioner, respectfully petitions this Honorable Court for a writ of certiorari directed to The United States Court of Appeals for the Fifth Circuit from a judgment of said Court entered on the 22nd day of May, 1959.

This suit was brought by C. A. Cain, individually and as administrator of the estate of Clifton L. Cain, deceased, against Illinois Central Railroad Company. It was brought in the District Court of the United States, Delta Division of the Northern District of Mississippi. A trial was had in that Court, and on the issues of fact raised by the pleadings, the matter was submitted to the jury under instruction of the Court. The jury returned a verdict for the Defendant railroad, the Petitioner here. From this verdict and judgment an appeal was had by the Respondent hereto to the United States Court of Appeals for the Fifth Circuit. That Court reversed the judgment of the lower Court and remanded the case thereto for a new trial. A petition for rehearing was denied.

OPINION BELOW.

(a) The opinion of the United States Court of Appeals for the Fifth Circuit appears in 266 Federal Reporter, Second Series at page 942. The opinion which was delivered by the Court on May 22, 1959, is appended hereto.

JURISDICTION.

(b) The jurisdiction of this Court is invoked because:

A. It is submitted that the Court of Appeals has, in this case, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision as provided in Rule 19 of this Honorable Court. The Court so departed by reversing the trial court solely for failure to admit in evidence a photograph of a crossing other than that at which the accident in question occurred without there being in the record on appeal a transcript of the testimony whereon relevancy could be ascertained, the Appellant having failed to furnish such transcript in violation of the Court's own order.

B. Moreover, the Court has also so departed therefrom by indirectly reversed on instructions to which no exception was taken as required by Rule 61 of the **Federal Rules of Civil Procedure.**

C. The Court of Appeals refused to follow Mississippi law as it was required to do.

(i) The judgment sought to be reviewed is dated and entered the 22nd day of May, 1959;

(ii) A petition for rehearing was overruled by order dated the 6th day of July, 1959. The mandate of the Court was stayed for sixty days by order dated the 14th day of July, 1959;

STATUTE INVOLVED.

(iii) The statutory provision believed to confer jurisdiction on this Court is Section 1254, Title 28, **United States Code Annotated.**

QUESTIONS PRESENTED FOR REVIEW.

(c) This is a case growing out of the death of a driver of an automobile at a railroad crossing. The car which he was driving was struck by a train of Petitioner. The Plaintiff in the trial court offered in evidence a photograph of a crossing other than the one at which the accident occurred. It was ruled inadmissible by the trial court. A question presented for review here is whether the Court of Appeals was in error and departed from the accepted and usual course of judicial proceedings in reversing this case solely on the stated ground of failure to admit this photograph when it did not have before it a transcript of the testimony taken in the trial court, which testimony was heard and considered by the trial judge in determining within his discretion and power the admissibility of this photograph.

Another question presented for review is whether the Court of Appeals also has departed from the accepted and usual course of judicial proceedings by indirectly reversing on the language contained in certain instructions of the court to the jury which was not excepted to as required by Rule 51 of the **Federal Rules of Civil Procedure,** although the Court in its opinion announced that it was not reversing by reason of these instructions.

Also for review is the question of whether the Court of Appeals refused to follow the laws of the State of Mississippi in its ruling on the admissibility in evidence of the photograph aforesaid, this Court was required to do.

(d) Section 7776 of the **Mississippi Code of 1942,** Annotated, Volume 6 Recompiled, page 185.

STATEMENT.

(e) As pointed out above, the record in this case does not contain a transcript of the testimony. Certain facts, however, were not controverted in the pleadings.

The Petitioner operates a railroad in and through Coahoma County, Mississippi. Generally the tracks and road beds operate in a northerly and southerly direction. Approximately three miles south of the City of Clarksdale, Coahoma County, in the Village of Davenport, there exists a highway running in an easterly and westerly direction which crosses Petitioner's railroad. At about 4:00 o'clock P. M. on July 20, 1957, Clinton L. Cain was driving and operating his 1956 Studebaker Commander tudor sedan. In operating said automobile Clinton L. Cain approached the above described crossing and proceeded in a northerly direction through the Village of Davenport and then turned to drive the automobile up the west incline approach to said crossing in an easterly direction. The automobile which Clinton L. Cain was driving was

struck at the said crossing by a passenger train of Petitioner. All of the occupants of the automobile were killed instantly as a result of having been struck by the train.

The Petitioner in its answer denied all charges of negligence made against it and affirmatively charged that the collision referred to in the complaint was brought about solely, exclusively and proximately by the negligence of said Clinton E. Cain in driving his automobile onto said crossing and stopping thereon in front of a rapidly approaching passenger train of Petitioner which was traveling at a rate of approximately 58 miles per hour. It was alleged that the crossing in question is situated near a settlement called Davenport. It is in the rural section of Coahoma County, Mississippi. The train was being operated in a lawful manner in broad open daylight. All statutory signals were given in the manner required by law. The Petitioner, in the operation of said train at said time and place, was guilty of no act of negligence of whatever kind. It is further affirmatively alleged that Petitioner is in no wise responsible for the death of said Cain and is liable for no damages.

On the issue of fact raised by the pleadings, the matter was submitted to the jury by the Court under instructions. The jury returned a verdict for the defendant railroad. From this verdict and judgment the appeal to the Court of Appeals was prosecuted which resulted in the reversal here complained of.

On September 5, 1958, Appellant, in the Court of Appeals filed its designation of contents of record on appeal pursuant to Rule 75 (a) of the **Federal Rules of Civil Procedure.** This designation did not contain either a transcript of the testimony or the Court's charge to the jury. It is apparent from the record which was filed that a sharp conflict of fact existed which was submitted to the jury.

The Appellant had sought to appeal in forma pauperis. The lower court entered an order denying this motion. The Court of Appeals then denied the motion of Appellant and intervenors for leave to appeal in forma pauperis without paying the expense of furnishing the stenographic transcript. Appellant was, however, granted permission to proceed on appeal without the prepayment of docketing fee and on the original papers under the provisions of Rule 74 (o), **Federal Rules of Civil Procedure**, and on typewritten brief. It was provided in this order that the original papers, pleadings, exhibits, etc. on file in this case "with the transcript of evidence" shall constitute the record on appeal in this case (R. 222). However, Appellant did not furnish the stenographic transcript for inclusion in the record.

In spite of this failure, the Court of Appeals has reversed the lower court on the sole stated ground that it failed to admit a photograph of a crossing other than that at which the accident occurred. As we have pointed out, however, the Court actually indirectly reversed on certain instructions to which no exceptions had been taken. It also erroneously failed to follow Mississippi law.

BASIS OF FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE.

(g) In the Court of first instance, the basis for Federal jurisdiction was diversity of citizenship.

ARGUMENT.

The Court of Appeals Refused to Follow Mississippi Law as It Was Required to Do in Reversing the Lower Court for Failure to Admit the Photograph.

On questions of admissibility of evidence, the Court of Appeals is bound by Mississippi law. **Erie Railroad Company v. Tompkins,** 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. **Lyon v. Mutual Benefit Health and Accident Association,** 59 S. Ct. 297, 305 U. S. 484, 83 L. Ed. 303. **City Service Oil Company v. Dunlap,** 60 S. Ct. 201, 308 U. S. 208, 84 L. Ed. 196.

In reviewing the decision on the admissibility of this photograph by the District Court, the Court of Appeals started with the presumption that no error was committed by the court below.

Marker, Federal Appellate Jurisdiction and Procedure, Section 233.

The photograph in question was marked for identification as No. 18 among Appellant's exhibits (R. 59).

This ruling by the Court of Appeals is made without benefit of the testimony surrounding the offer of the picture in evidence. The ruling of the Court was based solely on statements by counsel in his brief which were unsupported by any record. The Court of Appeals for the Fifth Circuit has itself condemned this type record. In **Cunningham v. Olson Drilling Company et al.,** 171 Fed. 2d 392, that Court said:

> "Since the argument and the ruling of the court on the objection of the Plaintiff are not in the record or otherwise authenticated by the lower court, we do not deem the question to be before us. We can review cases only on the record and not on statements of counsel."

Although the Court of Appeals in its order provided that the original papers, pleadings, exhibits, etc., on file in

this case with a transcript of the evidence shall constitute the record on appeal in this case (R. 22), no transcript of evidence was ever brought to the Court of Appeals.

The trial court was following the general rule of evidence when it refused to admit this photograph. 20 **Am. Jur.**, Evidence, Section 307, page 286.

Moreover, the trial court apparently recognized that it was bound by state law on this question. This the Court of Appeals refused to do. Mississippi by case law has passed upon this question. In **Wilkinson v. City of Jackson**, 177 Miss. 414, 170 So. 901, the Supreme Court of Mississippi states:

> "... We do not think, however, that it was permissible to show that depressions leading into other catch basins were similarly constructed, as the negligence, if any, in the construction of the particular depression would not be excused or nullified by repetitions of the negligent act in the construction of inlets or depressions at other points in the city. 43 C. J. 1256; 10 R. C. L. 944. Under this view, neither testimony comparing the construction of other depressions and catch basins with the one in question, nor the plans and specifications prepared or supervised by the appellant's witness Keele, for the PWA Project on West Capitol Street in the city of Jackson, were admissible."

See also

Merchant's Wharf Boat Assn. v. Smith, 3 So. 249;
Anderson v. King, 217 Miss. 140, 63 So. (2) 792.

The Admissibility of This Photograph Was Within the Discretion of the Trial Court.

That the relevancy of this photograph was a matter within the discretion of the trial court is well established. This principle is set out in two cases which Respondent cited in his original brief in the Court of Appeals. The

first is the case of **Jensen v. Southern Pacific Company** (California 1954), 129 C. A. 2d 67, 276 Pac. 2d 703. In that case the Court observed that:

> "Determination of relevancy including similarity of conditions in such a case, is primarily the function of the trial judge."

That case discussed the question of whether the conditions were "identical" or "substantially similar" at the two crossings. In the case at bar we do not know what the trial judge found in this connection. He spoke of the crossings as being "somewhat similar." He did not consider them sufficiently similar to justify admitting the photograph in evidence. We submit that without knowing what the testimony disclosed in this connection, the Court of Appeals should not have placed him in error. Again, in a case cited by Respondent in his original brief in the Court of Appeals, **Deshotel v. A. T. & S. F. Railroad Company** (Cal. 1956), 272 P. 271, the Court stated that, "determination of similarity 'is primarily the function of the trial judge.'"

See also

20 **Am. Jur.**—Evidence, Sections 247 and 249.

It will be recalled that the trial court had before it the general law as set out in 20 **Am. Jur.**—Evidence, Section 307, supra, as well as the law in Mississippi. The textwriter mentioned above spoke in connection with conditions at other places and pointed out that it was essential that a proper basis be laid for the admission of such proof. It is apparent that no basis whatever was laid for the offering of this photograph as far as the record on appeal was concerned. Evidently the lower court did not consider that a satisfactory basis had been laid. This is within its sole discretion. There is nothing in the record on appeal even to suggest that this discretion was abused.

We should like to request the Court to examine carefully this photograph (Ex. 18—R. 59). We submit that it

shows nothing of importance. It does not even show the crossing. If a crossing is there, it must be supplied with the aid of the imagination. It does not show the arrangement of the approach or approaches, if any, to the crossing. One cannot tell by looking at the photograph whether there be one or more such approaches. One cannot tell from whence they come nor where they go. The purpose of arranging the "Mississippi Law Stop" signs is not disclosed. Any similarity between the scene in this photograph and the crossing in question is lacking. Since the crossing itself is not shown, the photograph does not give a true picture of the position of the stop signs in relation to the crossing. There is no testimony to connect the two. The photograph standing alone utterly fails to do so. The trial judge, with the benefit of the testimony, did not find sufficient similarity to justify admission. In so doing he acted within his lawful discretion.

The case of **Nemer v. The Atchison Topeka & Santa Fe Company** (1958), 156 C. A. 445, 319 Pac. 770, was an action by an automobile driver for damages sustained when his automobile was struck by a train. The court held that the refusal to permit the driver to introduce evidence concerning other grade crossings was not improper where the driver offered no evidence tending to establish the conditions of traffic, types of signals or physical characteristics of other or similar railroad crossings other than attempting to introduce a picture taken five months after the accident purporting to show that vehicles frequently become caught upon the railroad tracks. The court in its opinion said:

> "Appellant's next contention to the effect that the court erred in refusing to permit the plaintiff to introduce evidence concerning other grade crossings on either side of Freeman Boulevard is without merit. At no time did the plaintiff offer any evidence tending to establish the conditions of traffic, the types of signals or the physical characteristics of other or

similar railroad crossings, other than the attempt to introduce the picture heretofore discussed."

We submit that this case again is authority for the proposition that this photograph standing alone and unsupported by any testimony cannot now be said to be admissible or that a failure to admit the same constituted error.

Defendant's Exhibits 1, 2, 3, 4, 5 and 6 are very revealing as to the situation at the crossing in this case. They show that as Cain turned to the right (east) to cross the railroad track he directly faced the "Mississippi Law Stop" sign. Furthermore, they show that as he drove north, the railroad track on his right was clearly visible. As to whether or not he was aware of the presence of the track there is, of course, nothing in the record. However, we submit that these photographs show that in open daylight anyone driving along beside this track and exercising his powers of sight could not escape being aware of the presence of this track. Moreover, a second stop sign facing south would be more confusing than helpful. It would appear to indicate the presence of a track running east and west. It would appear to require a motorist continuing to the north and past the crossing to stop. It would be thoroughly confusing and deceptive. It would not, in our judgment, constitute good practice.

In the case of **Jakeman v. Oregon Shortline Railroad Company** (1929), 43 Idaho 505, 256 P. 88, testimony that in the "forepart" of October the witness passed over the crossing in question and the statutory bell located there would not ring while trains were passing over the crossing was held too remote where the accident in suit occurred on October 18. Such evidence, said the court, "invites the jury to indulge in the most fanciful and remote speculation".

Again, **A. T. & S. F. Ry. Co. v. Aynes** (Okla. 1954), 271 Pac. 2d 312, 46 A. L. R. 2d 930, was an act'n to recover

damages for personal injuries arising from a collision at a railroad crossing where, over an objection of the defendant railroad that it was too remote in point of time, the trial court admitted evidence of the plaintiff that at an unspecified time at another nearby railroad crossing warning signals of the same type as that at the crossing where the accident occurred, but not connected to the same operating circuit, failed to give warning of an approaching train. The Appellate Court held that this constituted an error so prejudicial to the defendant as to require a reversal of the judgment rendered for the plaintiff. The court said that evidence regarding failure of warning signals at a remote time, **different place**, and under different circumstances and conditions, generally was inadmissible.

We submit that standing alone, as does this photograph, it should not now be said that the same should be admitted in evidence. In this connection, we invite the court's attention to Rule 61 of the **Federal Rules of Civil Procedure** dealing with harmless error. In the case of **University City, Mo. v. Home Fire and Marine Ins. Co.** (C. C. A. 8th, 1940), 114 Fed. 2d 288, it was held that this rule is for the guidance of district courts but that it should be heeded also by the appellate courts.

Surely in view of the remote connection which this photograph had to the entire record in this case, if it were erroneously excluded, the error was harmless.

We submit that in reversing this case for the sole stated reason of the failure of the trial judge to admit this photograph in the state of the record as described above and particularly with no transcript of the testimony available, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. If a trial court can be placed in error on so flimsy an excuse as this and if a litigant can thereby be deprived of a verdict

earned at the hands of a jury, then the trial court has, indeed, been deprived of its traditional function.

The Court of Appeals Has Erroneously Taken Into Consideration Alleged Error in Two Instructions.

Rule 51 of the **Federal Rules of Civil Procedure** requires that a party object to instructions before the jury retires to consider its verdict. Appellant made no objection to the instructions given in this case.

The Court of Appeals in its opinion (p. 5) sets out the charge given by the lower court with reference to the presence of the "Mississippi Law Stop" sign. The court stated that it did not review this instruction as alleged error since no exception was taken to the charge.

Yet the court in commenting on this instruction stated that, "This error (the exclusion of the photograph) was aggravated by the treatment given in the court's charge to the absence of a warning to vehicles on this northbound road" (p. 6).

Again, the court in commenting on this instruction said:

> "Moreover, the charge did not instruct the jury with the certainty or clarity that was demanded that this failure was negligence, which, if a cause of the injury, would demand some verdict for the plaintiff. It only authorized a verdict" (p. 6).

If the court considers that the error committed by the exclusion of the photograph was "aggravated" by an erroneous instruction, then we submit that indirectly this has been a cause for reversal.

The Court of Appeals also commented on the failure of the lower court, "in not giving a requested affirmative charge substantially to the effect that as a matter of law this was a hazardous crossing and that under the circumstances there present the defendant was negligent as a

matter of law for running at a rate of 58 miles per hour at the crossing" (p. 8).

The court, in commenting on this failure to instruct stated, "we think that the uncontroverted facts demonstrate the existence as to any automobile driver in the situation facing Cain in what the Supreme Court has called a 'highly dangerous crossing'" (p. 9).

Further, the court stated in this connection that, "We mention the point solely as it bears on the materiality and prejudicial effect of the exclusion of the photograph from evidence" (p. 9). We again submit that the Court of Appeals has erroneously taken into consideration the failure of the lower court to instruct on this point although there was no exception taken at the proper time.

Thus, the Court of Appeals has found from the meager record in this case that this crossing was a "highly dangerous" one. The court considered this meager record in the light of the case of **Donald, Adm., v. G. M. & O. R. R. Co.**, 220 Miss. 714, 71 So. 2d 776. This, we submit, the court should not have done. That case is clearly distinguishable from the case at bar on the facts. In that case the vision of the motorist was blocked until within 8 to 10 feet of the track. Obviously, this interfered with "the ability of the traveler to observe the approach of the train." This is not the case here. Here there were no obstructions to prevent the traveler from seeing the approach of the train. The photographs reveal a completely open crossing. This case really falls within the rule of **Spilman v. G. & S. I. R. Co.**, 173 Miss. 725, 163 So. 445. There is lacking in this case, as was true in the Spilman case, "some peculiar condition of hazard which reasonable prudence should have reasonably foreseen would likely lead to a collision notwithstanding ordinary care on the part of the driver of the motor car."

Ordinary care on the part of the driver of the motor car required that he stop at the crossing and look for the train

in compliance with Section 7776 of the **Mississippi Code of 1942**, Annotated, Volume 6 Recompiled. (Appendix D.)

Had the driver of the car in this case done that, he would clearly have seen the train approaching and there would have been no collision. Even the meager facts shown by the record in this case glaringly demonstrate that Cain took no precaution whatsoever for his own safety.

We submit that this record does not in any manner justify finding error on behalf of the lower court and the setting aside of the verdict of a jury where both the court and the jury had the benefit of seeing the witnesses, hearing them testify and having a complete picture of the circumstances of this accident as the same unfolded in the court room and was duly recorded in the record.

Again, we submit that the Court of Appeals in indirectly reversing the lower court on instructions to which no objection had been made in conformity with Rule 51 of the **Federal Rules of Civil Procedure** so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

The Court of Appeals reversed the trial court for refusing to admit a photograph of a crossing other than that at which the accident occurred, which photograph actually reveals nothing of importance. The Court of Appeals did so without knowing from the record what testimony surrounded the offer of this exhibit and ignored the trial court's discretion. It then criticized and commented upon and took into consideration in reversing instructions to which no exceptions had been taken. It refused to follow state law.

We submit that this Petitioner as well as trial courts throughout the nation are entitled to call upon this Honorable Court to exercise its power of supervision in this case.

Wherefore, Petitioner prays that a writ of certiorari be granted to the United States Court of Appeals for the

Fifth Circuit and that this Court review the opinion and the judgment of the said United States Court of Appeals of the Fifth Circuit and reverse the judgment thereof.

Respectfully submitted,

ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioner,

By: .....
J. L. BYRD,
and

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Certificate.

I, J. L. Byrd, of Counsel for Petitioner, certify that before filing, in accordance with the rules of this court, I mailed, postage prepaid, a copy of the foregoing petition for writ of certiorari to the Honorable Lamax B. Lamb, Jr., of Marks, Mississippi, Attorney for Respondent.

This the ..... day of September, 1959.

.....
Of Counsel.

APPENDIX A.

(Opinion Rendered May 22, 1959.)

Before Hutcheson, Chief Judge, and Tuttle and Brown, Circuit Judges.

Tuttle, Circuit Judge: This is an appeal by the plaintiff from a judgment based on a jury verdict for the defendant railroad in a crossing accident case. Aside from attacks on the weight of the evidence there are two asserted errors of law on which appellant seeks a reversal.

The appellant is suing for the death of his son who was instantly killed, together with three companions, when the automobile in which they were riding was struck at a public railroad crossing in the small unincorporated community of Davenport, Mississippi. On a record that does not contain a transcript of the evidence, there are nevertheless pleadings, photographs, a plat and depositions that permit the following statement of the factual situation at the time of the accident.

Cain, the deceased, was not a resident of the community. He was driving in a northerly direction alongside the tracks of the defendant railroad. The tracks were elevated some 5 to 6 feet higher than the gravel road which paralleled the track for some 1,000 feet before the crossing in question. As the automobile approached the crossing the road divided into a broad Y; the right hand arm turned at almost a right angle up an incline of 5.5 feet to the tracks, about 33 feet away; the left arm turned at an angle of approximately 55 degrees. Thus, an automobile driver taking the course which Cain was using would come directly into the railroad crossing some thirty feet away if he made a right turn. There was no railroad stop sign facing down this northerly road. There was a sign on the right hand side of the road but its front, with the required lettering, was built to face the road constituting the left arm of

the Y.' A person driving north as Cain was had only the end of the board sign, about an inch in thickness, facing him. There was no traditional railroad cross arm sign. The Cain car turned right and onto the tracks. The engineer testified that when he first saw the car it was coming onto the tracks; the construction of the diesel locomotive obstructed his view close in to the left side; the fireman saw it first and called to him; he already had his horn blowing and his bell ringing; he put on the brakes and they started to "take hold" just as the engine struck the car. The fireman testified that he first saw the car turning and coming up onto the tracks and he saw the automobile could not clear the tracks and called to the engineer, who immediately applied the brakes. The train was traveling at the rate of 58 miles an hour.

As Cain drove north the train was approaching from his right rear.

The Mississippi statute requires a stop sign fifty feet away from the crossing to "insure warning of the proximity of the crossing."

The photographs make it clear that a person driving north as Cain was might make a right hand turn around the sign and enter the crossing without having ever had notice that he was entering a railroad crossing.

There was no visual warning of the existence of a railroad crossing until the presence of the tracks themselves gave notice of that fact. By that time the driver might reasonably be expected to be within a few feet of the tracks.

The first basis of appellant's attack on the trial court's judgment is its failure to permit the plaintiff to introduce into evidence a photograph of a railroad stop sign used by the defendant railroad at a crossing "somewhat similar to the crossing at issue in this case." The theory on which the appellant contends the photograph was relevant

is that it depicts an act of the defendant in the discharge of its duty of care to the public in satisfaction of the requirements of statute and is therefore admissible to show that the defendant itself had recognized a heavier burden as being required in the discharge of its duty of warning the public in similar circumstances. The sign shown in the tendered photograph in use where two roads converge and cross the railroad at a single crossing has two faces — one bearing the statutory words facing down each of the two roads. Here, it will be remembered, there was no sign facing down the road Cain was driving on.

In denying a subsequent motion to appeal in forma pauperis the trial court stated as to this ground:

> "The other fact which was not in dispute, as I recall the evidence, was the location and size of the Mississippi Stop Law sign. With respect to that, as I recall, I **positively** instructed the jury that the location of the sign was negligence.
>
> "I further instructed them that if they felt that that negligence, from a preponderance of the evidence, was the proximate cause of the collision, they **should** find their verdict for the plaintiff."

At another point in the discussion the court said substantially the same thing. This would have been a correct instruction to the jury, because in a comparative negligence state like Mississippi any negligence of the plaintiff would merely reduce the damages recoverable.

Reference to the court's charge to the jury discloses that it did not "positively" or even **expressly** charge the jury that the failure to place the sign correctly was negligence. The charge was:

> "From the evidence in this case it is without dispute that the railroad company failed to erect and maintain a 'Mississippi Law Stop' sign such as I have men-

tioned to you, at its proper distance, which I have also mentioned, from the crossing. (Note: Without stating that this failure amounted to negligence per se, the court then continued.) If you find as a fact that this negligence on their part proximately contributed to the collision or proximately caused the collision, then you **may** find your verdict for the plaintiff." (Emphasis added.)

This, of course, in light of what has been said above, would be an incorrect charge even though the court had expressly said that this failure amounted to negligence by the defendant.

No exception was taken to this charge and we thus do not review it as alleged error, although its effect may well have had a decisive role with the jury. We consider it only in connection with the expressed view of the court that if it erred in refusing admission of the photograph, such error was cured by the charge.

We thus come to the question of whether the photograph should have been admitted in evidence. We conclude that it should have been, and that it was error to exclude it. This error was aggravated by the treatment given in the court's charge to the absence of a warning to vehicles on this north bound road. In the charge quoted above, the court said only that it was without dispute that the required sign was not at its proper distance from the railroad. The proof showed much more. It showed that as to the traffic moving north on this road there was in effect **no sign at all.** The photograph showed what this same defendant had done to meet this unusual situation under somewhat similar circumstances elsewhere. It showed that the railroad had erected two poles with the required sign on each of them turned at right angle to each other so as to face in the direction of oncoming traffic on each of the two roads. Moreover, the charge did

not instruct the jury with the certainty or clarity that was demanded that this failure was negligence, which, if a cause of the injury, would demand some verdict for the plaintiff. It only authorized a verdict.

The relevancy of the photograph is that it shows acts of the same defendant in discharging its obligation to insure the warning of the public as required by statute. It is similar to an admission against interest. Of course, this is not a case in which a party seeks to show conditions maintained by others as evidence of the proper standard of due care, although in the Mississippi case of **Southern Railway v. McLellan**, 80 Miss. 700, 32 So. 283, the court held that it was error for the trial court to exclude evidence of the use of slag ballast by other railroads when the issue of negligence related to the contention that the brakeman was injured because of negligent failure to furnish a safe place to work. The comment from 20 A. Jur. 286, quoted by appellee, is not applicable here. Nor is **Wilkinson v. City of Jackson**, 177 Miss. 414, 170 So. 901, authority for appellee's contention, the evidence there excluded being only in the nature of self-serving evidence as to conduct by the defendant. We find no Mississippi case dealing with this precise subject, but see **Jensen v. Southern Pacific Co.**, 129 Cal. App. 2d 67, 276 Pac. 2d 703; and **Deshotel v. A. T. & S. F. Rwy. Co.** ... Cal. App. ..., 300 Pac. 2d 910. We conclude that this evidence was relevant and material, and in light of the failure of the court's charge to give the full effect that the evidence itself might be expected to have in enlightening the jury, its exclusion was prejudicial error.

The appellant also contends that the trial court erred in not giving a requested affirmative charge substantially to the effect that as a matter of law this was a hazardous crossing and that under the circumstances there present the defendant was negligent as a matter of law.

for running at a speed of 58 miles an hour at the crossing. Reference to the case of **Donald, Adm. v. Gulf, Mobile & O. R. R. Co.**, 220 Miss. 714, 71 So. 2d 776, indicates that the Supreme Court of Mississippi did in that case hold as a matter of law that a crossing was unusually hazardous. The court seemed to set the standard as whether, under the facts before it, it could determine that compliance by a driver with the requirements of Section 1776 of the Mississippi Code of 1942 would necessarily prevent a collision. Holding there that it "would not **necessarily** prevent a collision at this point," the court said: "Obviously this was a very dangerous crossing." Having arrived at that conclusion the court then said:

> "The proof was conclusive that the crossing was a highly dangerous one and that the speed of the train was 55 miles per hour. Under such circumstances there is no escape from the conclusion that the operation of the train over that particular crossing at a speed of 55 miles per hour constituted negligence."

The court set aside a jury verdict for a defendant and sent the case back for a new trial.

While we would be inclined to agree that the complete absence of an effective warning or stop sign, coupled with the other circumstances, i. e., the road on which Cain was travelling was parallel to the track so that a train might, as did this one, approach at high speed from the rear of a vehicle and at a level with the top of the automobile, and thus be out of sight until the turn onto the crossing was completed, would probably make this crossing as dangerous as that in the Donald case, we cannot reverse for failure of the trial court to give the requested instruction. Here, too, there was a failure to object to the court's charge and failure to give the requested charge, although the court invited counsel into chambers to make any objections desired.

We mention the point solely as it bears on the materiality and prejudicial effect of the exclusion of the photograph from evidence.

Although appellate courts recognize that there must be some degree of latitude given to the trial courts in ruling on the admissibility of evidence, we think that the uncontroverted facts demonstrate the existence, as to any automobile driver in the situation facing Cain, of what the Mississippi Supreme Court has called a "highly dangerous" crossing. We conclude, therefore, that the exclusion of evidence from which the jury might infer that this same defendant had used better means in a similar concurrence of roads to "insure warning of the proximity of the crossing" was reversible error.

We have carefully considered the contention of appellant that the court erred in refusing certain discovery efforts by appellant. Without in any way passing upon the propriety of any future efforts by appellant, we hold that the trial court did not exceed its discretion in the orders heretofore made by it in this respect.

The judgment is Reversed and the case Remanded for a new trial.

Hutcheson, Chief Judge: I concur in the result.

A true copy

Test: Edward W. Wadsworth,
Edward W. Wadsworth,
Clerk, U. S. Court of Appeals,
Fifth Circuit, New Orleans,
Louisiana.

APPENDIX B.

Judgment.

Extract from the Minutes of May 22, 1959.

C. A. Cain,

No. 17,539. versus

Illinois Central Railroad Company.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial.

It is further ordered and adjudged that the appellee, Illinois Central Railroad Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C.

In the
United States Court of Appeals
for the Fifth Circuit.

No. 17,539.

C. A. Cain,
Appellant,

versus

Illinois Central Railroad Company,
Appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

(July 6, 1959.)

On Petition for Rehearing.

Before Hutcheson, Chief Judge, Tuttle and Brown, Circuit Judges.

Per Curiam:

It Is Ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby Denied.

(Original Filed: July 6, 1959.)

APPENDIX D.

Section 7776, Mississippi Code of 1942, Annotated, Volume 6 Recompiled.

7776. Driver of motor vehicle to stop before crossing Railroad track.

It shall be unlawful for any person to drive or propel any automobile or automobile truck or other motor driven vehicle upon any railroad track at a public highway or municipal street intersecting such railroad at grade crossing without first stopping at a distance of not less than ten feet nor more than fifty feet from the nearest track and looking for train; provided, however, that this shall not apply to automobiles or other motor driven vehicles of any municipality, when responding to any alarm of fire, nor to the automobiles or other motor driven vehicles of the police department when responding to any emergency call, nor to motor driven ambulances when responding to an emergency call, and it shall not apply where crossings are provided with flagmen and a signal to proceed has been given by the flagman, or where gates are provided and the gates open. And in the trial of all actions to recover personal injury or property damages, sustained by any driver of such motor driven vehicles for collision of said vehicle and train in which action it may appear that the said driver may have violated any of the provisions hereof, the question of whether or not the said violation was the sole or approximate cause of the accident and injury shall be for the jury to determine. The violation of this section shall not of itself defeat recovery, and the question of negligence or the violation aforesaid shall be left to the jury; and the comparative negligence statutes and prima facie statute of this state shall apply in these cases as in other cases of negligence.